

UNITED STATES OF AMERICA)) Prosecution Motion
v.)) for Court Order
Manning, Bradley E.)) for Mental Health Professionals
PFC, U.S. Army,))
HHC, U.S. Army Garrison,))
Joint Base Myer-Henderson Hall))
Fort Myer, Virginia 22211))
16 August 2012

RELIEF SOUGHT

The prosecution in the above case respectfully requests that, in the interest of justice, this Court issue an order to enable the Accused's mental health professionals to speak with the prosecution regarding their evaluations of the Accused between 30 June 2009 and the present and to order the mental health professionals to give the prosecution access to their notes from 30 June 2009 to the present.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. RCM 905(c)(2).

FACTS

The Accused is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030(a)(1), and five specifications of violating a lawful general regulation, in violation of Articles 104, 134, and 92, Uniform Code of Military Justice (UCMJ). See Charge Sheet.

On 3 July 2012, the defense sent the prosecution their initial Article 13 witness list. The defense requested that the prosecution produce numerous mental health professionals, as well as the Accused to discuss the conditions under which he was kept at Quantico. See AE CLXXXI (Defense Requested Witnesses: Article 13 Motion, dated 3 July 2012). Specifically, the defense requested the following mental health professionals for the following reasons:

"Capt. Hocter will testify that he gave weekly status reports stating that he felt the POI precautions were unnecessary." *Id.*

"[COL Malone] will testify that the Quantico Brig instituted more precautions than he would from a psychiatric perspective. He will testify that he consistently recommended to the Quantico Brig to remove PFC Manning from POI status. He will testify that if PFC Manning were not in custody, he would have

recommended routine outpatient care for him. He will testify that it has long been known that restriction of environmental and social stimulation has a negative effect on mental function. He will testify that PFC Manning's restrictive confinement was not necessary from a psychiatric perspective, and that he made repeated recommendations that the PFC Manning's status should be downgraded." Id.

(b) (7)(C) will testify that isolation or solitary confinement is among the most harmful conditions that can be imposed upon a detainee. He will also testify how PFC Manning was held in restrictive solitary confinement for nearly a year without any psychiatric or behavioral justification. Finally, he will testify how these conditions likely placed PFC Manning at an increased risk of exacerbating any existing psychiatric symptomatology or condition." Id.

The prosecution conducted cursory interviews of the defense requested mental health professionals to make an RCM 703 determination for the purpose of the prosecution's 10 July 2012 response, but did not go into any detail regarding the mental health professionals' evaluation or diagnosis of the Accused. All the mental health professionals that the government spoke with were authorized by the defense to respond to the government's limited questioning.

On 10 July 2012, the government responded to the defense's witness list request and agreed to produce all the requested mental health professionals. See AE CXCV (Government Response to Defense Article 13 Witness Request, dated 10 July 2012).

On 27 July 2012, the defense filed their Article 13 motion. In it, the defense addresses, among other things, the Accused's placement on Prevention of Injury (POI) status at the Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF). The motion discusses the Accused's interactions with the Accused's mental health professionals, and their recommendations as to whether the Accused should or should not be on POI status, as well as the Accused's interactions with staff personnel and their determinations that the Accused should remain on POI status. The defense also attached to the motion the Accused's MCBQ Suicide Risk/Prevention of Injury Assignment Reviews, beginning on 30 July 10, as well as observation and evaluation notes and Classification and Assignment Review documentation, which contains reports and reviews from both MCBQ personnel and mental health professionals. In addition, the defense's motion contains affidavits from CAPT Hocter and COL Malone. See Defense Article 13 Motion, attachments 2, 7, & 8.

Recently, the prosecution attempted to reach out to additional mental health professionals seen by the Accused during his time in the Kuwait Confinement Facility and at the MCBQ that were not listed as defense witnesses--CAPT Richardson, LTC Russell, and LCDR Weber. The prosecution reached LTC Russell and asked some cursory questions, but has not been able to speak with CAPT Richardson and LCDR Weber. The prosecution has not even been able to get contact information for CAPT Richardson without a waiver from defense or a Court order. See Enclosure 2. In refusing to provide a phone number for CAPT Richardson, the Staff Judge Advocate at the Naval Hospital Camp Pendleton, informed the prosecution of the following:

It is Naval Hospital Camp Pendleton's position that an interview of any of our healthcare providers requires a judge signed order authorizing the release of protected healthcare information, absent a HIPAA release from our patient/the accused. These requirements are contained in the attached DOD regulation 6025.18R:

"C7.5.1. Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

C7.5.1.1. In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order;"

See Enclosure 2; see also Department of Defense Directive (DoDD) 6025.18-R, DOD Health Information Privacy Regulation (24 January 2003), C7.5. Standard: Disclosures for Judicial and Administrative Proceedings. The Staff Judge Advocate at Camp Pendleton also emailed a copy of the Directive.

On 14 August 2012, the prosecution emailed the defense their Article 13 witness list, which listed CAPT Richardson, LTC Russell, and LCDR Weber. The prosecution also asked the defense if they could obtain a HIPAA release from the Accused to enable the prosecution to speak with the Accused's mental health providers and reminded the defense that they had mentioned in chambers that they would not have an issue providing a waiver. See Enclosure 1. Based on the information from the Staff Judge Advocate at the Naval Hospital Camp Pendleton, the prosecution forwarded the defense DoD 6025.18-R, DoD Health Information Privacy Regulation. See Enclosure 3. The defense responded that the prosecution had already spoken with the defense witnesses. See Enclosure 1.

On 15 August 2012, the prosecution informed the defense that most of the mental health professionals only answered very specific questions and did not go into detail. The prosecution further informed the defense that two mental health professionals the Accused saw in Kuwait, CAPT Richardson and LCDR Weber, were on the government's witness list, and they required a written waiver to speak with the prosecution. See Enclosure 1. The defense responded that "The Government should ask whatever questions it wants of the Defense listed witnesses, and then renew its request with specificity regarding the questions the Defense witnesses refused to answer." See Enclosure 1. The prosecution responded that the two witnesses on the prosecution's witness list would not speak to the prosecution without a waiver or court order and that the prosecution had not been able to ask pertinent questions based on what the defense alleged in their Article 13 motion. See Enclosure 1.

The defense informed the prosecution, "You will need to request a Court Order." See Enclosure 1.

The prosecution is calling CAPT Richardson based on medical records the prosecution received during the course of the investigation. See Enclosure 4. CAPT Richardson is a psychiatrist who assessed the Accused between 2 July 2010 and 28 July 2010, when the Accused

was confined in Kuwait. CAPT Richardson will testify to the Accused's suicidal ideations, specifically that he determined the following regarding the Accused:

Immediate risk of self harm is still considered to be elevated/high due to his poor reliability, inability or lack of desire to adequately express thoughts in regards to SI [suicidal ideations], not contracting for safety, having made a noose and gathered items that had potential to harm self. Additionally, his regressed behavior and poor ego strength exacerbate the risk.

See Enclosure 4 at 00000910. CAPT Richardson suggested that the Accused transfer to another facility with better resources to manage the complexities of the Accused's condition. See Enclosure 4. CAPT Richardson will testify that the Accused's assessed suicide risk was elevated or high during the duration of his stay at the Kuwait Confinement Facility. See Enclosure 4. CAPT Richardson noted that the Accused claimed that he would not harm himself but likely made the statements because the Accused wanted a change in uniform and in status. See Enclosure 4 at 00000883-84. CAPT Richardson based his determination on the Accused's poor reliability and inconsistency, having made two nooses and being deceitful about them, saying he would be "patient," and saying he would kill himself if he knew he could be successful. Id. CAPT Richardson also based his determination on the Accused's fragile ego, which could easily decompensate. Id.

The prosecution is calling LCDR Weber based on medical records the prosecution received during the course of the investigation. See Enclosure 4. LCDR Weber is a psychologist who assessed the Accused between 6 July 2010 and 27 July 2010, when the Accused was confined in Kuwait. LCDR Weber will testify to the Accused's suicidal ideations, specifically that she determined the following regarding the Accused: "Immediate risk for self harm or harm to others is considered to be elevated/high." See Enclosure 4 at 00000902. This assessment continued throughout the entirety of the assessments which ended in 27 July 2010. See Enclosure 4 at 00000872.

Medical records and MCBQ forms reveal that the records from the Kuwait Medical Facility were communicated to the MCBQ. See, e.g., Defense Article 13 Motion, attachment 1.

WITNESSES/EVIDENCE

The prosecution requests the Court consider the charge sheet and the listed enclosures.

LEGAL AUTHORITY AND ARGUMENT

In general, unlimited access to mental health records of an Accused by the prosecution is prohibited. See Military Rule of Evidence (MRE) 513; DoDD 6025.18-R.

MRE 513 establishes a privilege between a patient and his psychotherapist if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. MRE 513(a). DoDD 6025.18-R establishes when protected

health information can be disclosed and used. Both protections, however, contain exceptions because mental health records are discoverable when relevant and material to the charges.

DoDD 6025.18-R permits disclosures in response to, among other things, a court order. See DoDD 6025.18-R, C7.5.1.1.

MRE 513(b)(7) articulates the following exception to the MRE 513 privilege:

"[t]here is no privilege . . . when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice . . ."

The defense has made the POI status of the Accused the focus of the Article 13 motion and at the same time will not allow the prosecution access to the witnesses or information that would explain why the Accused was on POI status and why, instead of trying to punish the Accused as the defense alleges, the MCBQ staff was trying to ensure that the Accused did not harm himself. For example, the defense alleges that, in violation of their internal policies, the Duty Brig Supervisor placed the Accused in MAX custody, citing the Accused's previous suicide watch in Kuwait. See Defense Article 13 Motion, paragraph 10. This was approved by the PCF Commander, who also determined that the Accused should be placed under special handling instructions of Suicide Risk (SR). Id. However, the defense proposes not to allow the government to ascertain the information that was communicated to Brig personnel and upon which they based this determination.

In its Article 13 motion, the defense has, in essence, offered the Accused's mental condition as a defense to why the Accused should not have been on POI status. See Defense Article 13 Motion. The defense is putting the Accused's mental condition at issue under circumstances not covered by RCM 706 or MRE 302 and then proposes to only allow the prosecution enough access to the Accused's mental health history to establish the points that the defense would like to establish--that there was a period of time when particular mental health professionals did not believe that the Accused was suicidal--and block the prosecution from accessing the mental health professionals and information that potentially establish, at least in part, the basis for the MCBQ personnel's decisions. By trying to limit the discussion to only the facts that are potentially helpful to the defense, the defense is deliberately providing the Court with only a small portion of the information that would be material to its decision.

Significantly, CAPT Richardson noted in the Accused's medical records that appear to have been reviewed by MCBQ personnel and mental health professionals (based on the notations in the MCBQ paperwork), that he believed the Accused changed his statements to mental health professionals regarding his suicidal ideations because he wanted to change his uniform and have less restrictions. CAPT Richardson and LCDR Weber both assessed the Accused's risk of committing suicide as elevated or high during the duration of his stay in Kuwait. Again, in the interest of justice, to ensure that the Court has an complete understanding the Accused's behavior

and history of suicidal ideations, the Court should determine that the MRE 513 privilege does not apply to the Accused's mental health information IAW MRE 513(b)(7).

In addition, the defense has waived the privilege. IAW MRE 510, a person waives a privilege by voluntarily disclosing or consenting to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. MRE 510.

Here, the Accused has waived the privilege insofar as he has provided affidavits from his mental health professionals regarding their treatment of the Accused and is calling his mental health professionals to testify about their assessments of the Accused. Again, the Accused cannot only waive the privilege for the portions of testimony and records that are potentially helpful to him (i.e., testimony that the Accused was not having suicidal ideations), but exclude the records and testimony that provide the basis for his POI classification.

The prosecution should not only be permitted to fully explore the assessments completed by LTC Russell, LCDR Weber, and CAPT Richardson, but should also be permitted to completely explore the bases for the recommendations of CAPT Hocter and COL Malone. Specifically, the prosecution should be permitted to explore the reasons behind CAPT Hocter's and COL Malone's recommendations that the Accused be placed on and removed from POI status and how their reasons may agree with or differ from the mental health professionals and MCBQ staff that deemed the Accused a suicide risk. The prosecution should also be able explore why CAPT Hocter and COL Malone believed that mental evaluation was necessary despite recommending he be removed from POI status, and why CAPT Hocter documented on his Suicide Risk/Prevention of Injury Assignment Reviews that he believed that the Accused may have to be segregated from the general population for other reasons. The prosecution should be able to explore the reasons for the diagnoses and how what the mental health professional see and evaluate differs from what the MCBQ personnel see and how they interpret it. For example, in defense's motion, they cite an affidavit obtained from CAPT Hocter which notes that the MCBQ generally keeps patients on precautions longer than he recommends. See Defense Article 13 Motion, attachments 7 & 8.

In addition, the prosecution should be able to explore why COL Malone checked the box on one of his Suicide Risk/Prevention of Injury Assignment Reviews that the Accused did not pose a threat to himself but noted that the Accused remained at moderate risk of self harm and why COL Malone noted that the Accused's suicide risk was moderate to high but then decreased. The prosecution should also be able to explore COL Malone's notation that the Accused made "provocative statements" and if other MCBQ staff could have interpreted as suicidal ideations. The prosecution should also be able to explore the differences between LTC Robert Russell's recommendations and COL Malone's recommendations when both completed Suicide Risk/Prevention of Injury Assignment Reviews of the Accused during the same time period, with one determining that the Accused was a suicide risk and one determining that the Accused was not a suicide risk. See Defense Article 13 Motion, attachment 2.

All notes and testimony documenting the Accused's prior suicidal ideations and any behavior that could be interpreted as suicidal by MCBQ personnel is material to the

understanding of why the Accused remained on POI status. This is, therefore, the type of situation that MRE 510 is designed to cover, as justice would not allow for the defense to pick and choose which parts of his mental health history are not privileged, thereby allowing only the potentially helpful portions to be disclosed and not revealing the entire picture for the Court.

Because the prosecution has not been able to ascertain necessary information from mental health professionals without a court order or a waiver from the Accused and the Accused will not sign a waiver, the prosecution requests a court order to obtain relevant information. To expedite the proceedings and prevent the government from having to request any supplemental orders from the Court, the prosecution requests that the order apply to all mental health professionals from 30 June 2009 to the present day and all mental health records. See Enclosure 5.

CONCLUSION

The prosecution requests that, in the interest of justice, this Court issue an order to enable the Accused's mental health professionals to speak with the prosecution regarding their evaluations of the Accused between 30 June 2009 and the present, and to order the mental health professionals to give the prosecution access to their notes from 30 June 2009 to the present.



ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense counsel on 16 August 2012.



ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

5 Encls

1. Email Re: Article 13 Witness List
2. Email Re: HIPAA Requirement
3. DoD 6025.18-R, C7.5
4. Accused Medical Records
5. Draft Court Order